In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1215

T. J. FALGOUT BOATS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Federal Tort Claims Act, 28 U.S.C. 1346, rather than the Suits in Admiralty Act, 46 U.S.C. 742, should govern the relief they seek as owners of a ship operating in navigable waters that sustained property damage when struck by a missile accidentally released by the pilot of a Navy jet.

On August 24, 1970, petitioners filed suit against the United States and the United States Department of the Navy pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), for $8,513.59 in property damages caused to its ship, when, on August 12, 1968, it was struck by a Sidewinder missile accidentally fired by a Navy pilot from a United States Navy airplane (Pet. App. 10, 11).

The district court found that the suit was "primarily 'of a maritime nature' and should be considered as a proceeding in admiralty" (Pet. App. 15). Since petitioners failed to file their suit within two years of the date the cause of action arose, as required by the Suits in Admiralty Act, 46 U.S.C. 745, the district court dismissed the complaint (Pet. App. 14-16).

The court of appeals affirmed, finding that under the principles laid down by this Court in *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249, the circumstances under which petitioners' damages occurred bore a significant relationship to traditional maritime activity because the release of the Sidewinder from the naval aircraft over navigable waters created a potential hazard to navigation, and the activities of the aircraft at the time were maritime in nature (Pet. App. 4-5). The court concluded, therefore, that jurisdiction rested exclusively within the Suits in Admiralty Act (Pet. App. 6), and that since petitioners failed to comply with the two-year statute of limitations under that Act, the district court correctly dismissed the complaint (Pet. App. 7).

1. In *Executive Jet*, *supra*, this Court suggested that a relationship to traditional maritime activity sufficient to confer admiralty jurisdiction would lie in situations where aircraft involved in torts were at the time "performing a function traditionally performed by waterborne vessels," such as where a "plane flying from New York to London crashed in the mid-Atlantic" (409 U.S. at 271) or where two light aircraft engaged in spotting schools of fish collide (*id.* at 271, n. 22).

The reason for conferring admiralty jurisdiction in these situations was well expressed in *Kelly* v. *Smith*, 485 F. 2d 520, 526 (C.A. 5):

> The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation. Rifle fire directed at a vessel * * * on a major commercial artery, * * * presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction * * *.

In the instant case, the release of the missile from the naval aircraft over navigable waters clearly created a potential danger to navigation. Moreover, the activities of the aircraft were maritime in nature. As the court of appeals noted, the Navy's aviation branch "functions essentially to serve in sea operations" (Pet. App. 4-5). Accordingly, the case was within the admiralty jurisdiction.

2. There is no conflict among the circuits on the application of admiralty jurisdiction to torts arising from aircraft which perform a function traditionally performed by waterborne vessels.[1] *Goodwin* v. *United States*, 141 F. Supp. 445 (E.D. N.C.), and *Moran* v. *United States*, 102 F. Supp. 275 (D. Conn.) upon which petitioners rely (Pet. 4-5), were decided, respectively, in 1956 and 1951, when non-vessel maritime tort claims were cognizable against the United States under the Federal Tort Claims Act. In 1960, however, Congress amended the Suits in Admiralty Act so as to bring within its reach all non-

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[1]See, *e.g.*, *Roberts* v. *United States*, 498 F.2d 520 (C.A. 9), certiorari denied, 419 U.S. 1070 (crash of private cargo plane enroute from Los Angeles to Vietnam into navigable water on landing approach to air base in Okinawa); *Higginbotham* v. *Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La.) (crash of helicopter acting as crewboat for offshore activities in Gulf of Mexico); *Hark* v. *Antilles Airboats, Inc.*, 355 F. Supp. 683 (D. V.I.) (crash of seaplane); *Kelly* v. *Smith*, *supra* (rifle fire from ashore directed at a fleeing boat, which wounded the pilot of the boat).

vessel maritime tort claims against the United States.[2] See, *e.g.*, *Roberts* v. *United States*, 498 F.2d 520 (C.A. 9), certiorari denied, 419 U.S. 1070; *DeBardeleben Marine Corp.* v. *United States*, 451 F. 2d 140 (C.A. 5); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167 (C.A. 2). Such claims, therefore, may no longer be brought under the Federal Tort Claims Act. 28 U.S.C. 2680(d).

Since petitioners admittedly failed to comply with the two-year statute of limitations governing maritime actions under the Suits in Admiralty Act, 46 U.S.C. 745, the court of appeals correctly held that the district court had no jursidiction over their complaint.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[2]A complete review of the purposes and consequences of the 1960 amendment is given in the government's brief in *United States* v. *United Continental Tuna Corp.*, No. 74-869, now pending in this Court.